No. 6855

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington, *Appellant*,

—VS.—

UNG SUE CHU, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee Ung Sue Chu, of Chinese birth, minor son of a domiciled Chinese merchant, arriving from China at the Seattle Immigration Port was denied admission by the local authorities and by the Secretary on Appeal, on the sole ground that he was without

> "a passport or any official document in the nature of a passport, visaed or authenticated by an American Consular officer;"

his claimed minority, relationship, and mercantile status of his father being conceded by the Department.

ARGUMENT

The position of the Department that such consular visae or authenticated document is a prerequisite to the admission of the wife or minor son of a domiciled Chinese merchant was negatived as far back as the *Mrs. Gue Lim* case, 176 U. S. 459, decided by the U. S. Supreme Court in 1899, and again by the *Cheung Sum Shee* case, 268 U. S. 336, decided in 1925.

The reluctance with which the judicial interpretation of the treaty involved, recorded in these two decisions, has been accepted by the Department is evidenced by its recurring assaults against this judicial construction, and its persistent efforts by Department rules and regulations to make the treaty mean something different from these court interpretations of it.

Referring to the treaty requirement of such visaed document as to certain classes of Chinese seeking admission, the court in *Mrs. Gue Lim* case, *supra*, says:

> "Does this section mean that in such case the wife must obtain the certificate therein provided for? We think not. * * *
>
> "Various other provisions of this section render it plain to our minds that it was never intended to extend to the wives of persons who were themselves entitled to entry * * *"
>
> "It is plain that in this case the woman could not obtain the certificate as a member of any of those specially enumerated classes. She is neither an official, a teacher, a student, a merchant nor a traveller for curiosity or pleasure. She is simply the wife of a merchant, who is himself a mem-

ber of one of the classes mentioned in the treaty as entitled to admission. And yet it is not possible to presume that the treaty, in omitting to name the wives of those who by the second article were entitled to admission, meant that they should be excluded. If not, then they would be entitled to admission because they were such wives, although not in terms mentioned in the treaty."

"In the case of the minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes. They come in by reason of their relationship to the father, and whether they accompany him or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of the class mentioned in the treaty as entitled to enter, then that person is entitled to enter without a certificate."

The Immigration Act of July, 1924, was construed by the department as excluding these wives and minor children, but its contention was likewise negatived by the Supreme Court in the *Cheung Sum Shee* case, *supra*. The court used this language:

"The wives and children of resident Chinese

merchants were guaranteed the right of entry by the Treaty of 1880, and certainly possessed it prior to July 1st, when the present immigration act became effective. *United States v. Gue Lim, supra.* That act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a Congressional intent absolutely to exclude the petitioners from entry * * *.

"Nor do we think the language of Section 5 is sufficient to defeat the rights which petitioners had under the treaty. In a very definite sense they are specified by the act itself as 'non-immigrants'. They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court twenty-five years ago."

Enlightening also, as to the view and position of the executive department of the government on that question, is the memorandum of the then solicitor for the Department of State which is given as an appendix to the Government's brief in the *Cheung Sum Shee* case, commenting on the *Gue Lim* decision as follows:

"The Supreme Court did not inject the wives and children of merchants into the treaty. It found that these persons were already within the treaty. Once the treaty has been authoritatively interpreted—that is, when it is known what the treaty means, what is its scope, what persons are included within its terms—this question is settled. It is no longer pertinent to inquire what reasoning was employed by the Supreme Court in reach-

ing its decision. The element of relationship was, of course, considered by the Supreme Court in deciding what the treaty meant—for what purposes the contracting parties concluded such convention. But relationship was merely an element of interpretation and not a basis of the right * * *. When the question first arose, the meaning of the treaty was not apparent. The Supreme Court interpreted the treaty and found that the contracting parties had given to the wives and children, as well as to the merchants themselves, the right to enter and reside."

The court in that case accordingly directed the admission of these wives and minor children who arrived without

"passports, consular visaes or other documents" of the character mentioned by the department in this case.

The tenacity with which the department hangs to its determination to enforce this visae requirement, regardless of final court decisions to the contrary, is not less remarkable than the ground on which they base their present order of rejection.

That ground is the Presidential Proclamation of February 21, 1928, designated as "Executive Order No. 4813" supplemented by Department Rules of 1926 and 1930.

This Presidential Proclamation presumes to require

"a passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance and duly visaed

and authenticated by an American Consular Officer."

The proclamation also presumes to include in this requirement persons of the class to which this applicant belongs. The proclamation was issued under the Act of Congress of May 22, 1918, which, on inspection, we find to be strictly a war measure with no pretended validity otherwise than "in time of war." The title of the act is:

> "An Act to prevent in time of war departure from and entry into the United States contrary to the public safety;"

the act itself providing that:

> "When the United States is at war, if the President shall find that the public safety required that restrictions and prohibitions in addition to those provided otherwise than by this section, and the three following, be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—
>
> "(a) For an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

The Congressional Enactment extending this act was included in the act of March 2, 1921, entitled:

> "An Act to make appropriations for the Dip-

lomatic and Consular Service for the fiscal year ending June 30, 1922,"

and was passed while we were still technically at war, as the Peace Resolution ending the war was not passed until later.

The District Court in *United States ex rel. v. Karmuth*, 29 Fed. (2) 314, upholds this reenactment as a

"revenue measure for the purpose of furnishing funds for the maintenance of consular services."

So construed as a "revenue measure", the act itself negatives the department interpretation as inclusive of a requirement for *non-immigration* visaes.

The revenue provisions of the order are these:

"179. The fee for the preparation and acknowledgment of an application for an *immigration* visae is one dollar.

180. The fee for an *immigration* visae is nine dollars.

181. * * * no persons are exempted from the necessity of paying the fee for either *immigration* application or *immigration* visae."

No provision whatever is made in this Presidential Proclamation for fees from non-immigration visaes, and it may therefore be presumed, conclusively we think, that the President had in mind the treaty non-requirement of non-immigration visaes, as pointed out by the Supreme Court in the *Gue Lim* and *Cheung Sum Shee* decisions.

The department, thwarted by the above two decisions in its purpose to base this visae requirement on treaty and statutory authority, is reduced in the present case to (1) the contention that these two de-

cisions are not applicable to the present case; and (2) that the lack of treaty or statutory authority is supplied by the Presidential Proclamation (analyzed above), and by various department "Rules and Regulations", and "General Orders", all of the nature of and including "Chinese General Order No. 17", issued by the Secretary of Labor June 27, 1930.

We deny the validity of this "General Order".

Section 24 of the Act of 1924 gives the right of issuing Rules and Regulations to "The Commissioner General with the approval of the Secretary of Labor;" with the further limitation that

> "all such rules and regulations insofar as they relate to the administration of this act by consular officers shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor."

Therefore, this "Chinese General Order No. 17", *issued by the Secretary of Labor*, instead of being issued by the *Secretary of State* on the recommendation of the Secretary of Labor, is wholly without controlling force or advisory influence in consular action. Attempted interference with consular duties by the Secretary of Labor, Secretary of Agriculture or any agency other than the State Department, would make for disorder and confusion.

The State Department's "instructions" to the consular service, as set forth on p. 7, Appellant's brief, is in no sense a compliance with Section 24 (Act of 1924) that these consular directions shall be by Rules and Regulations prescribed by the Secretary of State *on the recommendation of the Secretary of Labor.*

These various Proclamations, Regulations and Orders were all effectively disposed of by the District Court in its decision that

> "treaty stipulations may not be avoided or set aside by Presidential Proclamation or promulgation of any rule by the department, but only by expressed Act of Congress, clearly manifesting such intent." (Transcript of Record p. 9)

This decision finds ample support in the authorities. Similar rules and regulations have been held to be in effect, attempts to legislate.

Acting under Section 24 of the Act of 1924, the Commissioner General of Immigration, with the approval of the Secretary of Labor and Secretary of State, issued rules defining "treaty merchants" as those engaged in international trade. In *Kumanomido v. Nagle*, 40 Fed. (2) 42 (this Circuit), the court held that this was a limitation on the statute and invalid.

In *United States v. George*, 228 U. S. 14-21, a case involving the department regulation defining proof to be given in preemption and homestead entry, the court said:

> "It is manifest that the regulation had a requirement which that section (of the law) does not and which is not justified by section 2246, to so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another?"

In *United States v. United Verde Copper Co.*, 196

U. S. 207, the statute construed authorizes and permits the removal for certain purposes of timber growing upon uplands, etc.—

> "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and undergrowth upon such lands *and for other purposes.*"

Under this statute the Secretary promulgated this rule:

> "7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining."

The court said:

> "The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. * * *"
>
> "If rule 7 is valid the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge, he can enlarge. Such power is not regulation, it is legislation."

Johnson v. Keating, 17 Fed. (2) 50-52, is a case of a non-quota immigrant, and its pertinency here is by analogy only, but in that respect this reasoning by the court is significant:

> "Congress never delegated to immigration officers authority to make a regulation which cuts down substantially the rights given by the act itself. It is probably, perhaps certain, that Congress could not delegate such substantive legislative power."

> "The language in Section 13 (b) that such non-quota immigrant may be let in 'under such conditions as may be by regulations prescribed' does not give authority to prescribe regulations which do not operate 'for the enforcement of the provisions of this act' (Section 24), but operate to enlarge the excluding features of the act."

Authorities cited by the Appellant (brief pp. 12-13) are cases of immigrants or non-quota immigrants, and are not pertinent to the question involved here.

Appellant's theory that the *Mrs. Gue Lim* case has no application to the present case, is directly disputed by the Department of State. Appellant's brief, pp. 11 and 12, cites Consular Regulations, Article XXII, Section 372, Note 8, recognizing the *Mrs. Gue Lim* doctrine that the wife of a domiciled merchant

> "has no status upon which a Section 6 Certificate could properly be issued."

The requirement that this visae should be on an instrument of a different character from Sec. 6 Certificate, is but another attempt of the Executive Departments to avoid the reasoning and effect of the *Mrs. Gue Lim* decision.

The whole question here involved, it seems to us, is summed up in the statute itself as construed by the court decisions we have cited. The Appellee is seeking entry, not on his own status, but on the status of his father. Neither by law, rules and regulations, nor in practice is this father, a domiciled merchant, required to have consular visae as a condition of his admission or readmission. That which cannot be required of the father, cannot be required of the minor

son seeking entry solely on his father's status. *Mrs. Gue Lim* and *Cheung Sum Shee* cases, *supra.* Act of 1924, Section 3 (6).

We respectfully submit that the order appealed from should be affirmed.

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